

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PENDLETON DIVISION

FRED ROY CAUGLIN

Petitioner,

Civil No. 010-580-SU

v.

FINDINGS AND
RECOMMENDATION

JEFF PREMO,

Respondent.

SULLIVAN, Magistrate Judge.

The Court's Order (#4) entered June 7, 2010, ordering petitioner to pay the filing fee by July 7, 2010, is hereby withdrawn. The record reflects that petitioner paid the filing fee on May 21, 2010. Accordingly, petitioner's

Application to proceed in forma pauperis (#1) is denied as moot.

Petitioner's Motion to Stay Federal Habeas Corpus during State Appeal Court Action (#5) should be construed as a motion for voluntary dismissal without prejudice and allowed.

If petitioner's "State Appeal Court Action" is "properly filed" it will toll the habeas corpus statute of limitations, and petitioner will not be prejudiced by dismissal. Therefore, there is no reason to stay the present proceeding.

In addition, a pending state court proceeding would indicate a unexhausted state court remedy. Therefore, petitioner's claims in this proceeding are apparently premature and subject to dismissal.

Petitioner's Petition (#2) should be denied without prejudice. This proceeding should be dismissed.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written

objections with the court. Thereafter, the parties have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation.

Certificate of Appealability

Should petitioner appeal, a certificate of appealability should be denied as petitioner has not made a substantial showing of the denial of a constitutional right. This cause is not appropriate for appellate review. See, 28 U.S.C. § 2253 (c) (2) .

DATED this 1st day of July, 2010.

s/Patricia Sullivan
Patricia Sullivan
United States Magistrate Judge